State of California

Board of Equalization
Legal Department - MIC:82
Telephone: (916) 323-3142
Facsimile: (916) 323-3387

Memorandum

To: Debbie Kalfsbeek
Interim Director
Program Policy & Administrative Branch (MIC:31)

Date: August 14, 2012

From: Carolee D. Johnstone
Tax Counsel III (Specialist)
Tax and Fee Programs Division (MIC:82)

Subject: **Environmental Fee: Calculation of Hours Employed In California**
Assignment No. 12-234

This is in response to your request of May 16, 2012, to Acting Assistant Chief Counsel Christine Bisauta. You state that special tax and fee staff have received several inquiries regarding a 2006 annotation that clarifies how, for purposes of what is commonly referred to as the "environmental fee,"[1] the number of hours an employee is "employed" in California should be calculated. In light of the several concerns that have been raised regarding this annotation, you request that the Legal Department review the March 21, 2006, legal opinion from which the annotation was taken to determine if it is still valid. If it is still valid, you request that the opinion be reissued to address these concerns.

It is our conclusion, after thorough review of the relevant law, that the opinion and, therefore, the annotation are still valid. Each of the concerns raised is stated and addressed below.

To begin, the "environmental fee" (also referred to as the "corporation fee" prior to July 2006) is imposed on "organizations[2] that use, generate, store, or conduct activities in this state related to hazardous materials, as defined."[3] (Section 25205.6, subd. (b).) Organizations with 50 or more employees are required to pay a tiered flat fee, the rate of which is based upon the number of employees the organization employs in this state. The tiered flat fee rate increases with the number of persons employed. For calendar year 2012, the fee ranges from $291 for organizations with 50 to 74 employees to $13,850 for organizations with 1,000 or more employees. (BOE Web site, www.boe.ca.gov/sptaxprog/.) The language of the statute at issue here currently reads:

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[1] Health and Safety Code section 25205.6, referred to hereafter as Section or § 25205.6. The "environmental fee" is administered by the Board of Equalization (BOE) pursuant to the Hazardous Substances Tax Law (part 22 (commencing with section 43001) of division 2 of the Revenue and Taxation Code), on behalf of the Department of Toxic Substances Control (DTSC) that administers the hazardous waste programs funded by the environmental fee.

[2] "Organization" is defined as "a corporation, limited liability company, limited partnership, limited liability partnership, general partnership, and sole proprietorship." (Section 25205.6, subd. (a).)

[3] Prior to July 2006, the fee was imposed only on corporations with employees employed in California. Effective July 18, 2006, Section 25205.6 was amended to expand the class of businesses subject to the fee to "organizations," as defined. (See Stats. 2006, ch. 77 (AB 1803); Note foll. § 25205.6.)

> For purposes of [Section 25205.6], the number of employees employed by an organization is the number of persons employed in this state for more than 500 hours during the calendar year preceding the calendar year in which the fee is due. (Section 25205.6, subd. (e).)

As noted, Section 25205.6 was amended effective July 18, 2006, after the March 21, 2006, legal opinion was issued. However, the only change to subdivision (e) (which was subdivision (d) when the opinion was issued) was the substitution of "an organization" for "a corporation"; the subdivision otherwise reads the same as it did in March 2006. Section 25205.6 has not been amended subsequent to the July 2006 amendment.

The annotation, which was taken from the March 21, 2006, opinion, reads:

> Once a person is hired as an employee, the employer has control over how that employee spends the hours of the workday, including whether or not to grant paid time off during those workday hours for vacation, illness, and holidays and whether or not the employee must work his or her assigned hours on a particular workday. Therefore, for the purposes of the Environmental Fee statute and calculation of the number of employees "employed [in California] for more than 500 hours," the term "employed" includes the hours for which an employee is paid by the corporation, even when the employee is absent due to vacation, illness, or holidays, for the duration of his or her employment. On the other hand, once the person is no longer employed by the corporation—i.e., is no longer "engage[d], suffer[ed], or permit[ted] to work," the employer no longer "has . . . control [or] determination of the hours of work" of the employee. Therefore, any hours included in the calculation of a terminated employee's severance pay or sick or vacation time cash out should not be included when calculating the number of hours a person was employed during a calendar year for purposes of determining the Environmental Fee owed by the corporation for that year. 3/21/06. (Emphasis added.)

The issue presented is whether or not the method set forth in the annotation for calculating the number of hours an employee is "employed" is still valid for purposes of determining the number of persons employed by an organization in California during the prior year.

CONCERNS AND RESPONSES

1. Since 2006, there have been changes in labor laws and how companies are required to compensate employees.

First, there have been no changes in the relevant labor laws since 2006. The federal and state labor laws on which the March 21, 2006, opinion relied have not been revised since the opinion was issued. Specifically, California Labor Code section 50.6, which permits the California Department of Industrial Relations to assist and cooperate with the Wage and Hour Division of the United States Department of Labor in enforcing the Fair Labor Standards Act of 1938, title 29 of the United States Code, section 201 and following (FLSA), has not been amended since it was added in 1953. Further, none of the definitions, including the definition of "employ," provided by Section 203 of the FLSA, have been amended since 1999.

Furthermore, none of the wage orders issued by the California Industrial Welfare Commission (Cal. Code Regs., tit. 8, §§11010- 11160), including Wage Order No. 4 referenced in the opinion (*id.* at § 11040), has been revised since 2002. The definition of "hours worked" in Wage Order No. 4 still states that "hours worked" is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (*Id.* at § 11040, subd. 2(K) [emphasis added].)[4]

Lastly, I have confirmed that the case law cited in the opinion is still good law. Accordingly, the labor laws on which the March 21, 2006, opinion relied have not changed since the opinion was issued.[5]

2. The inclusion of "time off" should not be included in the computation of the hours employed since the employees would not be at the workplace that would be considered to have exposure to hazardous materials.

The Environmental Fee is imposed on organizations that, in their everyday business pursuits, use, generate, store, or conduct activities in this state related to hazardous materials, as defined. These materials include such ubiquitous items as printer and fax machine toner, inks, correction fluid, fluorescent light bulbs, and batteries. (*Morning Star Co. v. Bd. of Equalization* (2011) 201 Cal.App.4th 737, 744.) The revenues from the fee are available "for the purposes specified in subdivision (b) of Section 25173.6." (§ 25205.6, subd. (d).) "Section 25173.6, subdivision (b) authorizes the appropriation of section 25205.6 funds primarily to remediate, clean up and dispose of hazardous materials, rather than to regulate the payers' business activities in using, generating or storing hazardous materials." (*Morning Star Co. v. Bd. of Equalization* (2011) 195 Cal.App.4th 24, 37 [emphasis added].)

In other words, the fee is not imposed for the purpose of preventing or remediating the organization's employees' exposure to these materials or to provide a direct burden or benefit to the employees or the employer. Rather, it is more like a tax in that the funds are used for pollution prevention and remediation of contaminated soil and groundwater to protect California's environment where funds are not otherwise available. In a broad sense, all Californians benefit from the fee through cleaner soil and groundwater. (DTSC's Final Statement of Reasons, November 7, 2007, Environmental Fee (R-2006-03).)

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[4] See also Cal. Code Regs., tit. 8, § 11010, subd. 2(G), § 11020, subd. 2(G), § 11030, subd. 2(H), § 11050, subd. 2(K), § 11060, subd. 2(G), § 11070, subd. 2(G), § 11080, subd. 2(G), § 11090, subd. 2(G), § 11100, subd. 2(H), § 11110, subd. 2(H), § 11120, subd. 2(H), § 11130, subd. 2(G), § 11140, subd. 2(G), § 11150, subd. 2(H), § 11160, subd. 2(J) (i.e., Wage Orders No. 1 through 3 and 5 through 16, all of which define "hours worked" in exactly the same terms).

[5] We do note that, in 2007, in addition to these laws, the DTSC, as directed by the California Supreme Court in *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 342, promulgated a new regulation for the purpose specifying which organizations "use, generate, store, or conduct activities in this state related to hazardous materials" and are, accordingly, subject to the environmental fee. (§ 25205.6, subds. (b) & (c); Cal. Code Regs., tit. 22, § 66269.1 (Regulation 66269.1); Gov. Code, § 11342.600.) Among other things, Regulation 66269.1 defines "employee," for purposes of the environmental fee, by reference to the definition of the term "employee" in the Unemployment Insurance Code. (*Id.* at subd. (a)(1); see Unemp. Ins. Code, §§ 621-623.) However, these provisions relate to determining if a person is an employee of an organization in the first place (which is beyond the scope of this discussion), not to what it means to be "employed . . . for more than 500 hours" (§ 25205.6, subd. (e)) or how to calculate the number of hours such employee was employed by the organization in the previous calendar year, once it is determined the person is an employee of the organization.

In contrast, for example, under the Occupational Lead Poisoning Prevention (OLPP) Act,[6] the Department of Public Health (DPH) is charged with establishing and maintaining an OLPP program that includes, among other things, monitoring cases of adult lead toxicity, following cases of occupational lead poisoning, and making recommendations for prevention of lead poisoning. (Health & Saf. Code, § 105185, subd. (a).) The OLPP fee is imposed on employers in certain Standard Industrial Classifications (SICs)[7] for which the DPH has documented evidence of potential occupational lead poisoning. (*Id.* at § 105190, subds. (a) & (f).) The revenues from the OLPP fee are to be expended for the purposes of the OLPP program. (*Id.* at § 105190, subd. (f).) The OLPP fee is also a flat fee, based on the number of employees employed by the employer, but the amount of the fee is determined by whether the employer is within Category A of the SIC (for which fewer than 20 persons have been reported with elevated blood lead levels in the prior three years) or Category B of the SIC (for which 20 or more persons have been reported with elevated blood lead levels in the prior three years), not by how many hours an employee was employed in California.

The Environmental Fee is not calculated based on the amount of time employees are exposed to the hazardous materials an organization may use, generate, store, or to which the organization may conduct related activities. The Legislature chose to rely upon the number of hours employed to determine, in a general manner, how much of these materials an organization may likely generate or dispose of in a year and to define which persons employed should be included in that calculation. Generally speaking, the more employees an organization employs, the more hazardous materials the organization will likely use, generate, store, or conduct activities related to these materials. The Legislature decided that it would not include in the calculation persons who were employed for less than one-fourth of the year (i.e., 500 or fewer hours). On the other hand, with respect to the OLPP program, all persons employed by the subject employer are exposed to the potential for lead poisoning, so all employees are included in the calculation of the fee regardless of the number of hours employed.

3. Labor laws require that certain paid time off, such as sick leave and vacation, not be included in some computations under labor-related statutes, such as the Family and Medical Leave Act (FMLA), and this is very confusing.

Some computations under certain labor-related statutes may not include hours of paid time off, such as for sick leave and vacations, but the provisions of such unrelated labor-related laws are not appropriate for determining the "number of persons employed . . . for more than 500 hours during the calendar year" under Section 25205.6. Those computations are established for the purposes of those unrelated laws, not for labor matters in general. For the definition of "hours employed" for purposes of Section 25205.6, subdivision (e), we must look to the laws that are generally applicable to labor matters, the primary federal and state labor law statutes and regulations relied on in the March 21, 2006, opinion and cited above.

An employer certainly knows the number of hours for which it pays each of its employees and how many of those hours were worked or taken as sick leave or vacation (or jury duty or other paid time off). Any confusion that may be occurring is not being generated by the "number of employees employed" calculation called for under Section 20525.6, as described in the

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[6] Chapter 2 (commencing with section 105175) of part 5 of division 103 of the Health and Safety Code .
[7] As specified in Health and Safety Code section 105195.

March 21, 2006 opinion, but is, more likely, generated by calculations required to be made for purposes of the Family and Medical Leave Act and any other labor-related statutes that are alluded to.

Based on the foregoing, we conclude that the March 21, 2006, opinion and annotation quoted above are still valid. As such, the substantive portion of the March 21, 2006, opinion is reissued, as you have requested, as follows (modified as appropriate to reflect the July 18, 2006, amendments).

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Legal Opinion: Request for Advice Regarding Whether Time Off for Vacation, Illness, and Other Paid Absences Must Be Counted as "Work Hours" for Purposes of Determining the Number of Employees Under the Environmental Fee, dated March 21, 2006, reissued August 16, 2012 (redacted and updated to reflect amendments to the underlying statute).

. . . .

The relevant provision is subdivision (e) of Section 25205.6,[8] which states:

> For purposes of this section, the number of employees employed by an organization is the number of persons employed in this state for more than 500 hours during the calendar year preceding the calendar year in which the fee is due.

(Health & Safety Code, section 25205.6, subdivision (e) [emphasis added].)

No other comments or information is provided in the Environmental Fee Law as to what constitutes "employed" or how the 500 hours should be calculated.[9] Please note, however, that, regardless of what terms may be used in the Environmental Fee return or any Board of Equalization publication, the operable term with regard to the "500 hours" is "employed," not "worked."

[8 This footnote was not in the original opinion and is added to fill in for information that has been redacted and to update the statute that is the subject of the opinion, which has been amended since the original opinion was issued. The environmental fee imposed under Health and Safety Code section 25205.6 initially only applied to corporations that "use, generate, store, or conduct activities in this state related to hazardous materials." (*Id.* at § 25205.6, subd. (b).) Due to an amendment to the statue, since July 18, 2006, the fee has been expanded to apply to organizations. The term "a corporation" in what was previously subdivision (d) has been replaced with the term "an organization" (as defined in subd. (a)) in what is now subdivision (e) and throughout the statute and the opinion.]

[9 This footnote was not in the original opinion, but we note that, in 2007, after the original opinion was issued, a regulation, California Code of Regulations, title 22, section 66269.1 was promulgated that defined "employee" by reference to the Unemployment Insurance Code (UIC). The UIC, however, does not provide a definition of the term "employed." There is considerable case law that interprets and applies the provisions of the UIC, particularly with respect to what factors are relevant to determining that an "employment relationship," as opposed to an "independent contractor relationship" exists for purposes of imposing liability for the unemployment insurance tax. (See, e.g., *Tieberg v. Unemployment Insurance Appeals Bd.* (1970) 2 Cal. 3rd 943, 946 ["The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired" (emphasis added)].) While similar to the "control" test with respect to "employ" described below, once the employment relationship is established, this test is not relevant to the determination of how many hours an employee is employed during a calendar year. Therefore, the new regulation does not substantively affect this analysis.]

Turning elsewhere, the terms pertaining to employment and hours worked are generally defined in the California Labor Code (Labor Code), which governs employer-employee matters in California, in collaboration with the federal administrators of the Fair Labor Standards Act of 1938, title 29 of the United States Code, section 201 and following (FLSA). (Lab. Code, § 50.6.)

FLSA defines "employ" as "to suffer or permit to work." (29 U.S.C.A. § 203(g).) Case law provides some guidance, commenting that the definition of the terms "employee"[10] and "employ" under the FLSA "contemplate[] (a) a situation in which the employer . . . agrees to pay a certain sum to the employee, and (b) has the control and determination of the hours of work by the employee." (*Huntley v. Gunn Furniture Co.* (W.D. Mich. 1948) 79 F.Supp. 110, 116 [cited by Ninth Circuit in *Gilbreath v. Cutter Biological, Inc.* (9th Cir. 1991) 931 F.2d 1320, 1330].)

The Labor Code itself provides only a few definitions, none of which are relevant to this inquiry. However, several relevant definitions are provided in regulations promulgated by the California Industrial Welfare Commission under the auspices of the Department of Industrial Relations and the Labor Code, specifically in section 11040 of title 8 of the California Code of Regulations (CCR). This section is also known, generally, as "Wage Order No. 4" and is applicable, as relevant here, to persons employed by private employers in California who are engaged in managerial, supervisorial, clerical, and office work occupations, such as accountants, bookkeepers, clerks, computer programmers and operators, secretaries, and typists, which would appear to fit the operations of your organization.

In Wage Order No. 4, "employ" is defined as "to engage, suffer, or permit to work." (8 CCR § 11040, subd. 2.(E) [emphasis added].) The addition of the word "engage" suggests that once a person is hired as an employee, that person is "employed," as the term in used in the Environmental Fee statute. However, Wage Order No. 4 also defines "hours worked" to mean "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (8 CCR § 11040, subd. 2(K) [emphasis added].)[11] This definition brings together the FLSA and Labor Code definitions of "employ" and the case law that discusses employer "control" in relation to the FLSA definition.

Based on this discussion, it is reasonable to conclude that, once a person is hired as an employee, the employer has control over how that employee spends the hours of the workday, including whether or not to grant paid time off during those workday hours for vacation, illness, and holidays and whether or not the employee must work his or her assigned hours on a particular workday. Therefore, for the purposes of the Environmental Fee statute and calculation of the number of employees "employed [in California] for more than 500 hours," the term "employed" includes the hours for which an employee is paid by your organization, even while absent due to vacation, illness, or holidays, for the duration of his or her employment.

On the other hand, once the person is no longer employed by your organization – i.e., is no longer "engage[d], suffer[ed], or permit[ted] to work," the employer no longer "has . . . control [or] determination of the hours of work" of the employee. Therefore, it is also reasonable to conclude that any hours included in the calculation of a terminated employee's severance pay or sick or

[10] "Employee" is defined by the FLSA as "any individual employed by an employer." (29 U.S.C.A. § 203(e)(1).)
[11] The FLSA also defines "hours worked," but the definition only deals with time spent "changing clothes or washing at the beginning or end of each workday," which is not at issue here. (29 U.S.C.A. § 203(o).)

vacation time cash out should not be included when calculating the number of hours a person was "employed" during a calendar year for purposes of determining the Environmental Fee owed by your organization for that year.

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Please let me know if you have any questions.

CJ/mcb

[redacted]

cc: [redacted] Department of Toxic Substances Control
Lynn Bartolo (MIC:57)